IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-220

* * *

COMMONWEALTH OF KENTUCKY, EX REL.
ED W. HANCOCK, ATTORNEY GENERAL,

Petitioner

V.

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents

* * *

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

* * *

# BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE IN SUPPORT OF PETITIONER

* * *

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STATE OF TEXAS

June, 1975

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Commonwealth of Kentucky, ex rel.
Ed. W. Hancock, Attorney General,
Petitioner

vs.

Russell E. Train, Administrator,
Environmental Protection Agency, et al.,
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# BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE, STATE OF TEXAS

As part of its plan to implement the national ambient air standards under the federal Clean Air Act,[1] the State of Texas requires that any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants to obtain a construction permit from the Texas Air Control Board, and to obtain an operating permit from the Board within sixty (60) days after operation of the facility begins.[2]

The granting of a construction permit is conditioned, inter alia, on a determination that "/t/ he proposed facility will not prevent the maintenance or attainment of any ambient air standard," and that "/t/ he proposed facility will utilize the best available /air pollution/control technology. . . ."[3] An operating permit is issued only if "/t/ he facility has been constructed in accordance with the requirements and conditions contained in the permit to construct."[4]

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[1] 42 U.S.C. Sec. 1857 et seq., (1970), as amended, 42 U.S.C. Sec. 1857 et seq. (Supp. III, 1973).

[2] Texas Air Control Board Regulation VI, attached hereto as Appendix A. The permit requirements are specifically set forth in Sections 3.27(a) and 3.28(a) of the Texas Clean Air Act, TEX. REV. CIV. STAT. ANN. art. 4477-5 (Supp. 1975).

[3] Regulation VI.

[4] Regulation VI.



The permit program, while not the sole method of attaining the federal air quality standards in Texas, is certainly one of the most important. Subjecting air pollution sources to preconstruction and premodification review provides the State with the opportunity to stop air pollution problems before they start. By requiring at the outset that steps be taken to ensure that the source does not endanger the ambient air standards, the permit program reduces the chances of a later enforcement action to require either that the source shut down altogether, or, at a minimum, that it retool its operation to install more effective abatement equipment at what will likely be increased costs. More importantly, the permit program greatly serves the goal of clean air, since it acts to prevent violation of air quality standards from ever occurring.

The prevention of air pollution at its source is an explicit goal of the federal Clean Air Act. 42 U.S.C. Section 1857 (a)(3) The "primary responsibility" for achieving this goal is placed by the Act squarely on the States and on local governments. Id. The requirement that a permit be secured prior to construction and operation of an air pollution source, as has been shown, is essential to the fulfillment of this responsibility. Accordingly, Texas has brought suit against the Department of Defense, et al., to require, inter alia, that it obtain Texas Air Control Board permits for four aviation fuel storage tanks at Kelly Air Force

Base in San Antonio.[5] Texas, therefore, has a direct interest in the outcome of the instant case.

ARGUMENT AND AUTHORITIES

I. A State permit program is clearly a "requirement respecting control and abatement of air pollution" with which the Federal Government must comply under 42 U.S.C. Sec. 1857f.

Texas believes that the issue sub judice was correctly decided in Alabama v. Seeber, 502 F.2d 1238 (5th Cir. 1974), and urges the Court to adopt the result reached in that case. While there is little room to improve either on the Fifth Circuit's well-reasoned analysis of the federal Clean Air Act or on its critique of the Sixth Circuit's decision in the instant case,[6] Texas offers the following brief argument.

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[5] Texas v. United States Department of Defense, C.A. SA-74-CA-271, W.D. Tex., filed Oct. 31, 1974. Control of hydrocarbon emissions from stationary sources is crucial to Texas' plan for attaining and maintaining the national ambient air standard for photochemical oxidants. See Texas v. EPA, 499 F.2d 289 (5th Cir. 1974) (suit challenging EPA's (a) rejection of Texas plan for achieving the oxidant standard and (b) promulgation of its own plan to meet this standard).

[6] Kentucky v. Ruckelshaus, 497 F.2d 1172 (6th Cir. 1974).



To discover whether Congress intended that federal instrumentalities should comply with state permit requirements the plain and unambiguous language of the Clean Air Act first must be considered. Caminetti v. United States, 242 U.S. 470 (1917). Section 1857f of the Clean Air Act plainly directs federal facilities to "comply with Federal, state . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." The permit program of the State of Kentucky quite clearly comes within this statutory language.

The Kentucky permit program, like that of Texas, is obviously a "requirement," in the ordinary sense of that word. Webster's Third International Dictionary (1969) at page 1929 defines "requirement" as something "needed," "called for," or "demanded"; a "requisite or essential condition." As amply demonstrated in the brief submitted by Kentucky, that State's permit program is not only "demanded" in the legal sense by state regulation, it is "essential" to Kentucky's effort to achieve the federally set ambient air quality standards. Respondents would have this Court depart from the ordinary meaning of "requirement" and define it to include only "applicable standards of air quality and emissions," the phrase employed in the Conference Report on the Clean Air Act, 1970 U.S. Code Cong. & Admin. News at 5381. Such a departure is clearly unwarranted.

Had Congress intended that the Federal Government comply only with state emission standards it would have said so. In fact, the Conference Com-

mittee rejected similar language -- "shall comply with applicable Federal, State, interstate, and local emission standards" -- found in the original House version of the Act in favor of the Senate version employing the word "requirements." 116 Cong. Rec. 19228 (1970). Similarly, had Congress intended to exempt federal facilities from all state requirements except "applicable standards of air quality and emissions," it could easily have done so by use of specific exclusionary language like that employed elsewhere in the Act. For example, 42 U.S.C. Sec. 1857c-6(c)(1) allows the EPA Administrator to delegate to the states power to enforce performance standards for new stationary sources "except with respect to new sources owned and operated by the United States." Identical language limiting the power of the states is also found in 42 U.S.C. Sec. 1857c-9(b)(1) which permits a delegation of authority to the states to enforce certain recordkeeping and monitoring requirements. These two facts -- rejection of the more restrictive House language in favor of the more comprehensive phrase "requirements respecting control and abatement of air pollution" and the failure to use specific exclusionary language, employed elsewhere in the Act, to exempt federal facilities from state permit requirements -- evinces an unequivocal Congressional intent to subject federal facilities to the same regulatory measures applicable to every other source of air pollution.

Moreover, the legislative history of the Act, as noted by the Fifth Circuit in Seeber,[7] showed a clear

[7] Alabama v. Seeber, 502 F.2d 1238, 1245 (5th Cir. 1974).



Congressional displeasure with the air pollution abatement efforts of the federal facilities. As Senator Spong remarked:

> . . . Federal agencies have been notoriously laggard in abating pollution. The pending bill would require Federal agencies to provide leadership for the control of air pollution. Only the President could exempt a Federal facility from the act, and then only if he determined the exemption to be in the paramount interest of the United States . . . .
>
> We cannot expect individuals and businesses to be motivated to abate pollution if their Government continues to pollute. I support wholeheartedly the mandate for the Federal Establishment to live up to the national commitment for clean air. 116 Cong. Rec. 32930 (1970).[8]

Congress, in short, meant what it said -- the federal Government shall be subject to the same air pollution control requirements as every one else, except where the President concludes that it is in the paramount national interest to exempt a federal facility from some specific requirement. The result reached by the Sixth Circuit, granting federal facilities a blanket exemption from state

[8] For similar comments by members of the House, see Appendix "B".

permit requirements, does violence to this carefully conceived regulatory scheme. For this reason the judgment of that court must be reversed.

## II. Neither the Supremacy Clause nor the Doctrine of Sovereign Immunity are applicable to this case.

In rejecting these defenses in Seeber,[9] the Fifth Circuit reasoned that since Congress may subject the federal government both to state regulation[10] and to suit,[11] and since Congress had accomplished both these results in the federal Clean Air Act, neither the Supremacy Clause nor sovereign immunity were available to bar a suit to compel compliance with such regulation. The logic is unassailable. Texas, however, respectfully offers these additional observations.

First, Kentucky's permit requirements, like those of Texas, were not issued in the provincial exercise of state police power, but in direct response to the Clean Air Act's mandate to the states to implement the national ambient air standards set by the federal Environmental Protection Agency. 42 U.S.C. Section 1857c-5(a). Thus, if the operations of federal facilities are fettered somewhat by the Kentucky permit program requirements, it is not due to "state regulation" in its traditional sense, but due rather to the will of Congress, expressed in the Clean Air Act, that the states assume the primary role of controlling air pollution at its source.

[9] Alabama v. Seeber, 502 F.2d 1238, 1247-48 (5th Cir. 1974).

[10] Mayo v. United States, 319 U.S. 441, 446 (1942).

[11] Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).



The Supremacy Clause is inapposite for the further reason that Kentucky's permit requirement has not been shown to in any way frustrate federal law, the evil against which the Supremacy Clause was designed to protect. See, Perez v. Campbell, 402 U.S. 637 (1971). To the contrary, the Kentucky permit program is in furtherance of -- indeed essential to -- the operation of at least one federal law, to-wit, the federal Clean Air Act.

Congress, however, was not unmindful that state requirements might unduly interfere with the activities of a federal instrumentality. Its solution to this potential problem was not to provide an across the board exemption of federal facilities from such requirements, but to authorize the President, on a case-by-case basis, to exempt them "if he determines it to be in the paramount interest of the United States to do so." 42 U.S.C. Sec. 1857f. The authority of the President to exempt federal facilities achieves the same policy objectives sought by the Supremacy Clause. If obtaining state permits frustrates the federal law under which the federal facility operates, and the paramount national interest is disserved thereby, the President can exempt the facility. Though not mentioned by the Sixth Circuit, the district court in the instant case feared

that Kentucky's permit program could interfere with "important Federal actions," and that the President's exemption power was too circumscribed to forestall such interference.[12] In concluding that the President could only exempt where he had requested an appropriation for federal air pollution control equipment and Congress had failed to comply with the request,[13] the district court was clearly wrong. Section 1857f is quite plain in its statement that the President may exempt a federal facility on the grounds that there is no money with which to comply only if he has requested the money and Congress has failed to give it to him. This narrow limitation in no way restricts the President's authority to exempt for other reasons, such as national defense or other paramount national concerns. The district court also noted that the President may not exempt federal facilities from new stationary source standards. While this is true, it is of little relevance here, since 42 U.S.C. Section 1857c-6(c)(1) prevents the states from enforcing new stationary source standards against federal facilities.

The doctrine of sovereign immunity is likewise inapplicable to the instant case. Kentucky seeks to compel federal officers to comply with their duty under the federal Clean Air Act to obtain permits to operate sources of air pollution. Such an action is within the well-recognized exception to sovereign

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[12] Kentucky v. Ruckelshaus, 362 F.Supp. 360, 367 (W.D. Ky. 1973).

[13] Id.



immunity permitting suits against federal officers for acts (of omission or commission) beyond their statutory powers. Dugan v. Rank, 372 U.S. 609, 621, 622 (1963). To avoid the obvious problem of "deciding the case on the merits under the guise of resolving the preliminary jurisdictional issues," the Court should accept "at face value, for jurisdictional purposes, the averments of the complaint unless they are so transparently insubstantial or frivolous as to afford no possible basis for jurisdiction, and . . . /give/ the averments thus accepted their natural jurisdictional consequences." Carter v. Seamans, 411 F.2d 767, 770 (5th Cir. 1969), cert.den. 397 U.S. 941 (1970). Applying that technique to the case before it, the court in Carter found that for jurisdictional purposes only, "the case sub judice is not against the United States, but one rather to compel the Secretary of the Air Force to perform a clear legal duty." Carter v. Seamans, supra, 411 F.2d at 771. Accordingly, the court held the defense of sovereign immunity was unavailable.

The situation is no different here than it was in Carter. Kentucky has alleged that the federal Clean Air Act imposes a duty on TVA and the Army to apply for state permits and has prayed the court to compel the performance of this duty. Whether the Act, in fact, does require federal compliance with Kentucky's permit program is a question to be decided on the merits and should not be confused with the sovereign immunity issue.

## CONCLUSION

The State of Texas urges this Court to reverse the judgment of the Sixth Circuit and to hold that TVA and the Army must comply with Kentucky's air pollution control permit requirements. At stake is not a mere state procedural requirement which can easily be supplanted by another or dropped altogether. Rather it is the only practicable method of preventing air pollution, which is the main thrust and goal of the Clean Air Act. Enforcement actions brought after an emission limitation or a compliance schedule deadline is violated is no substitute for engineering review prior to the construction or modification of an air pollution source. Where the former mechanism seeks to abate or redress an existing or threatened condition of air pollution, the latter seeks to prevent that condition or threat from ever arising. If the decision of the Sixth Circuit stands, and federal facilities are insulated from state permit requirements, the Federal Government, contrary to the wishes of Congress, will be effectively exempted from the national commitment to end air pollution.

The judgment of the Sixth Circuit must be reversed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of the State of Texas, Amicus Curiae in Support of Petitioner was served by mailing true copies hereof via United States mail, postage prepaid, to: Honorable William B. Saxbe, The Attorney General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Walter Kiechel, Jr., Deputy Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Martin Green, Section Chief, Pollution Control Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable James A. Glasgow, Attorney, Land and Natural Resources Division, Department of Justice, Tenth and

Constitution Avenue, Washington, D. C. 20530; Honorable Robert L. Klarquist, Attorney, Appellate Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, United States Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Jacques B. Gelin, Attorney, Appellate Section, Department of Justice, Washington, D. C. 20530; Honorable Kent Frizzell, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D. C. 20530; Honorable Herbert S. Sanger, Jr., Deputy General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Robert H. Marquis, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Beauchamp E. Brogan, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Justin M. Schwamm, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee 37830; Honorable Andrew P. Miller, Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219; Honorable Evelle Younger, Attorney General, State of California, Honorable Foster Knight, Deputy Attorney General, State of California, Honorable Robert H. O'Brien, Assistant Attorney General, State of California, Honorable Nicholas C. Yost, Deputy Attorney General, State of California, 600 State Building, 217 West First Street,



Los Angeles, California 90012; Honorable Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; Honorable David C. Short, Assistant Attorney General, Division of Natural Resources and Environmental Law, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; Honorable David D. Beals, Assistant Attorney General, Division of Natural Resources and Environmental Law, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; Honorable Robert F. Trevey, Attorney, Department for Natural Resources and Environmental Protection, Division of Air Pollution, East Main Street, Frankfort, Kentucky 40601; Honorable James F. Gordon, United States District Judge, Western District of Kentucky, United States Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, Honorable Pierce Lively, Circuit Judge, United States Court of Appeals For the Sixth Circuit, and Honorable Lester L. Cecil, Senior Circuit Judge, United States Court of Appeals For the Sixth Circuit, 608 United States Courthouse Building, Cincinnati, Ohio 45202, all this the 7th day of June, 1975.

Philip K. Maxwell

PHILIP K. MAXWELL
Assistant Attorney General

# APPENDIX A

## REGULATION VI

## CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

Rule 601. Section 3.27 (a) and Section 3.28(a) of the Texas Clean Air Act require any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this State to obtain a construction permit from the Texas Air Control Board before any actual work is begun on the facility, and to obtain an operating permit from the Texas Air Control Board in order to continue to operate the facility after a sixty day start-up period.

Rule 602. The owner of the facility or the operator of the facility authorized to act for the owner is responsible for applying for and obtaining a permit to construct and operate.

Rule 603. Consideration for Granting a Permit to Construct and Operate.

603.1 In order to be granted a permit to construct, the owner or operator of the proposed facility shall submit information to the Texas Air Control Board

in order that the Texas Air Control Board may determine that:

603.11 The proposed facility will comply with all Rules and Regulations of the Texas Air Control Board and with the intent of the Texas Clean Air Act.

603.12 The proposed facility will not prevent the maintenance or attainment of any ambient air quality standard.

603.13 The proposed facility will not cause significant deterioration of existing ambient air quality in the area.

603.14 The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the Executive Secretary.

603.15 The proposed facility will be located in accordance with proper land use planning.

603.16 The proposed facility will utilize the best available control technology, with consideration to the technical practicability and economic



reasonableness of reducing or eliminating the emissions resulting from the facility.

603.17 The proposed facility will achieve the performance specified in the application for a permit to construct.

603.2 If the owner of the proposed facility cannot demonstrate that the facility will comply with Rule 603.17, a conditional construction permit may be granted until such time as the owner can demonstrate compliance with Rule 603.17.

603.3 In order to be granted a permit to operate the owner of the facility shall demonstrate that:

603.31 The facility is complying with the Rules and Regulations of the Texas Air Control Board and the intent of the Texas Clean Air Act.

603.32 The facility has been constructed in accordance with the requirements and conditions contained in the permit to construct.

Rule 604. Pursuant to Section 3.27(a) of the Texas Clean Air Act, a permit to construct and a permit

to operate shall not be required for those sources exempt by the Texas Air Control Board. A list of exemptions is available upon request from the Executive Secretary of the Board.

Rule 605. Persons desiring to be exempt from the permit system may apply in writing to the Executive Secretary of the Texas Air Control Board.

Rule 606. Installations exempt by the Texas Air Control Board may be required by local air pollution control agencies to receive a permit or permits from that agency, or register with that agency.

Rule 607. The rules contained in this Regulation shall be in force immediately and shall supersede the previous Regulation VI which became effective on March 5, 1972.

Date Adopted: July 27, 1972

Date Filed with Secretary of State: August 1, 1972

Date Effective: August 31, 1972



APPENDIX B

SELECTED COMMENTS OF HOUSE MEMBERS ON THE DUTY OF THE FEDERAL GOVERNMENT UNDER THE FEDERAL CLEAN AIR ACT

Representative Staggers: "Instead of exercising leadership in controlling or eliminating air pollution the Federal Government has tended to be slow in this respect. The foregoing provision is designed to reverse this tendency." 116 Cong. Rec. 19205 (1970).

Representative Springer: "One of the frustrating aspects of air pollution legislation is the presence of large Federal installations either operated directly by the Government or under its direction which contaminate the atmosphere on a large scale. How can we expect cooperation or creditability for the governmental effort when the installations controlled by Uncle Sam are some of the worst polluters? The Federal Government as much as some private businesses has dragged its feet for purely economic reasons. Allowing the Government to remain immune from the rules which we wish to impose on others is wrong. Actually it should lead the way." 116 Cong. Rec. 19207 (1970).

Representative Skubitz: "In addition to all the things that are going to be required from private business, for the first time we are saying without equivocation that Federal installations

are going to have to live up to the rules that the Federal Government makes for others." 116 Cong. Rec. 19208 (1970).

Representative Rogers: "Furthermore, we have a provision about Federal-installation polluting. We direct that all Federal installations, who, incidentally, are some of the biggest polluters in this Nation, shall abide by the pollution laws, and the only way they can get an exception is to go to the Secretary /now the President/. . . . In other words, this is telling the Federal agencies: 'We want you to stop polluting the air, too.' " 116 Cong. Rec. 19211 (1970).